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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was convicted of possession of an unregistered and unserialized silencer in violation of the National Firearms Act, 18 U.S.C. §§ 5861(d), (i), 5871. The trial court, over defense counsel's timely objection, refused to instruct the jury that the government, as an element of the offenses charged, was required to prove that petitioner knew the item in question was a "firearm" within the meaning of the statute. On appeal, the government conceded that the district court's instructions erroneously omitted an essential element of the offenses charged under *Staples* v. *United States*, 511 U.S. 600 (1994), but argued nonetheless that the error was "harmless" under *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam). The Eleventh Circuit agreed, holding the error was "harmless" because the court was "certain that the verdict in this case would have been the same" had the jury been instructed on the omitted element.

The question presented is:

Whether the Eleventh Circuit correctly held, in conflict with decisions of the First, Fourth, Fifth, Sixth, Seventh, Ninth and District of Columbia Circuits, and those of 18 state courts of last resort, that a trial court's complete failure to instruct the jury on an essential element of a criminal offense can be "harmless" under Article III and the Fifth and Sixth Amendments to the United States Constitution even where the jury has made no findings concerning the omitted element.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

I. THE COURT OF APPEALS' HOLDING THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS CONFLICTS WITH DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS. 10

II. THE COURT OF APPEALS WRONGLY HELD THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS EVEN WHERE THE JURY HAS FAILED TO FIND FACTS ESTABLISHING THE MISSING ELEMENT BEYOND A REASONABLE DOUBT. 17

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 7, 8

Bollenbach v. *United States*, 326 U.S. 607 (1946) 19

California v. *Roy*, 117 S. Ct. 337 (1996) . . . . . *passim*

Carella v. *California*, 491 U.S. 263 (1989) . . . . . *passim*

Carpenter v. *Commonwealth*, 771 S.W.2d 822 (Ky. 1989) 12

Chapman v. *California*, 386 U.S. 18 (1967) 2, 11, 13

Commonwealth v. *Tharp*, 541 A.2d 14 (Pa. Super. Ct. 1988) 13

Commonwealth v. *Thomas*, 514 N.E.2d 1309 (Mass. 1987) 12

Connecticut v. *Johnson*, 460 U.S. 73 (1983) . . . 17, 23, 24

Dawson v. *State*, 894 P.2d 672 (Alaska Ct. App. 1995) 12

Hennessy v. *Goldsmith*, 929 F.2d 511 (9th Cir. 1991) 3, 15, 16

Hereford v. *State*, 615 So. 2d 1303 (Ala. Crim. App. 1993) 12

Page

Hoover v. *Garfield Heights Mun. Ct.*, 802 F.2d 168 (6th Cir. 1986), cert. denied, 480 U.S. 949 (1987) 3, 13, 15

Hunter v. *State*, 1996 WL 352829 (Miss. June 27, 1996) 12

Ianniello v. *United States*, 10 F.3d 59 (2d Cir. 1993) 11, 12

In re Winship, 397 U.S. 358 (1970) 19

Jones v. *State*, 666 So. 2d 995 (Fla. Dist. Ct. App. 1996) 12

Lomas v. *State*, 639 P.2d 551 (Nev. 1982) 12

McKinney v. *State*, 553 N.E.2d 860 (Ind. Ct. App. 1990) 12

Monk v. *State*, 619 A.2d 166 (Md. Ct. Spec. App. 1993) 12

Mouton v. *State*, 892 S.W.2d 234 (Tex. Ct. App. 1995) 12

Old Chief v. United States, 1997 WL 3230 (Jan. 7, 1997) 21, 22

People v. *Flynn*, 589 N.E.2d 383 (N.Y. 1992) 12

People v. *Kobrin*, 903 P.2d 1027 (Cal. 1995) 12

People v. *Mattas*, 645 P.2d 254 (Colo. 1982) 12

Page

People v. *Navarette*, 629 N.E.2d 742 (Ill. App. Ct. 1994) 12

People v. *Vaughn*, 524 N.W.2d 217 (Mich. 1994) 12

Robinson v. *State*, 473 S.E.2d 519 (Ga. Ct. App. 1996) 12

Rose v. *Clark*, 478 U.S. 570 (1986) 24

Roy v. *Gomez*, 81 F.3d 863 (9th Cir.) (en banc), vacated sub. nom. *California* v. *Roy*, 117 S. Ct. 337 (1996) 3, 9, 20

Slusher v. *State*, 814 P.2d 504 (Okla. Crim. App. 1991) 12

Smoot v. *Commonwealth*, 445 S.E.2d 688 (Va. Ct. App. 1994) 12

Sparf v. *United States*, 156 U.S. 51 (1895) 20

Staples v. *United States*, 511 U.S. 600 (1994) 6, 7, 10

State v. *Aumick*, 894 P.2d 1325 (Wash. 1995) 12

State v. *Avila*, 710 P.2d 440 (Ariz. 1985) 12

State v. *Barr*, 237 N.W.2d 888 (S.D. 1976) 12

State v. *Bluhm*, 460 N.W.2d 22 (Minn. 1990) 12

State v. *Brown*, 647 A.2d 17 (Conn. App. Ct. 1994) . . . 12

State v. *Bryant*, 670 A.2d 776 (R.I. 1996) 12

Page

State v. *Correa*, 706 P.2d 1321 (Haw. Ct. App. 1985) 12

State v. *Federico*, 510 A.2d 1147 (N.J. 1986) 12

State v. *Forsyth*, 642 P.2d 1035 (Mont. 1982) 12

State v. *Gibson*, 908 P.2d 352 (Utah 1995) 12

State v. *Gunn*, 437 S.E.2d 75 (S.C. 1993), cert. denied, 510 U.S. 1115 (1994) 12

State v. *Jynes*, 652 So. 2d 91 (La. Ct. App. 1995) 12

State v. *Lopez*, 920 P.2d 1017 (N.M. 1996) 12

State v. *Miller*, 400 S.E.2d 611 (W. Va. 1990) 12

State v. *Monroe*, 790 P.2d 1188 (Or. Ct. App. 1990) . . 13

State v. *Moriarty*, 321 N.W.2d 324 (Wis. Ct. App. 1982) 13

State v. *Myers*, 510 N.W.2d 58 (Neb. 1994) 12

State v. *Nason*, 433 A.2d 424 (Me. 1981) 12

State v. *Rhome*, 462 S.E.2d 656 (N.C. Ct. App. 1995) 12

State v. *Teel*, 793 S.W.2d 236, cert. denied, 498 U.S. 1007 (1990) 12

State v. *Watson*, 885 P.2d 1226 (Kan. 1994) 12

Page

State v. *Wright*, 581 A.2d 720 (Vt. 1989), cert. denied, 498 U.S. 1032 (1991) 12

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) . . . . . *passim*

Teel v. *Tennessee*, 498 U.S. 1007 (1990) 3, 14

United Bhd. of Carpenters v. *United States Bay Counties Dist. Council*, 330 U.S. 395 (1947) . . 19, 20

United States v. *DiRico*, 78 F.3d 732 (1st Cir. 1996) . . . 13

United States v. *Gaudin*, 115 S. Ct. 2310 (1995) 19

United States v. *Johnson*, 71 F.3d 139 (4th Cir. 1995) . . 13

United States v. *Johnson*, 82 F.3d 429 (11th Cir. 1996), cert. granted, 117 S. Ct. 451 (Nov. 15, 1996) (No. 96-203) 16

United States v. *Laughlin*, 26 F.3d 1523 (10th Cir.), cert. denied, 115 S. Ct. 428 (1994) 14

United States v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), cert. denied, 116 S. Ct. 2529 (1996) 15

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 20

United States v. *Mentz*, 840 F.2d 315 (6th Cir. 1988) . . . 9

United States v. *Nguyen*, 73 F.3d 887 (9th Cir. 1995) . . 14

United States v. *Olano*, 507 U.S. 725 (1993) 16

Page

United States v. *Parmelee*, 42 F.3d 387 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995) . . . . . *passim*

United States v. *Pettigrew*, 77 F.3d 1500 (5th Cir. 1996) 3, 8, 13

United States v. *Raether*, 82 F.3d 192 (8th Cir. 1996) 8, 11, 12

United States v. *Rogers*, 9 F.3d 1025 (2d Cir. 1993) . . . 11

United States v. *Wiles*, 1996 WL 707539 (10th Cir. Dec. 10, 1996) (en banc) 14, 15

United States v. *Winstead*, 74 F.3d 1313 (D.C. Cir. 1996) 14

Vigil v. *State*, 859 P.2d 659 (Wyo. 1993) 12

Waldemer v. *United States*, 98 F.3d 306 (7th Cir. 1996) 13

Walls v. *State*, 560 A.2d 1038 (Del.), cert. denied, 493 U.S. 967 (1989) 12

Constitutional Provisions

U.S. CONST. ART. III, § 2 2

U.S. CONST. AMEND. V 2

U.S. CONST. AMEND. VI 2

Page

Statutes

18 U.S.C. § 922(o) 5

18 U.S.C. § 5861(d) 5, 7

18 U.S.C. § 5861(i) 5

18 U.S.C. § 5871 i

Miscellaneous

Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995) . . 19, 25

J. Greabe, *Spelling Guilt Out Of A Record? Harmless-Error Review Of Mandatory Presumptions And Elemental Misdescriptions*, 74 B.U. L. REV. 819 (1994) 4

Brief for the United States in Opposition, *Masotto* v. *United States* (No. 95-1794) 11, 18

Brief for the United States in Opposition, *United States* v. *Edmonds* (No. 96-25) 18

Brief for the United States in Opposition, *United States* v. *Johnson* (No. 96-203) 16

Brief for the United States in Opposition, *United States* v. *Parmelee* (Nos. 94-1933 and 94-9078) 18

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GEORGE G. ROGERS, PETITIONER,

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

George G. Rogers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-17a) is reported at 94 F.3d 1519. The judgment of the district court (App., *infra*, 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996, and a timely suggestion of rehearing *en banc* was denied on January 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT

This case presents for review the important and unanswered question of whether a trial court's failure to instruct the jury as to an essential element of the offense charged, and the jury's resultant failure to make any findings concerning that element, can ever be "harmless" under this Court's decisions in *Chapman* v. *California*, 386 U.S. 18 (1967), and *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993), given the defendant's constitutional right to a jury determination of guilt as to each element of the offense charged. The court of appeals, contrary to decisions of the First, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits, and those of eighteen state courts of last resort, held that the instructional omission below was "harmless" notwithstanding the jury's failure to find the predicate facts necessary to establish the omitted element beyond a reasonable doubt. The court did so based upon its certainty "that the verdict in this case would have been the same" had the jury been instructed on the omitted element. In so holding, the

court of appeals followed similar rulings by the Second and Eighth Circuits, and those of nine state courts of last resort.

The Eleventh Circuit's decision openly recognized that "[n]either we nor the Supreme Court has ever definitively ascertained the consequences that should follow from an instructional omission, and our sister circuits are divided on the issue." App., *infra*, 10a. As the court explained, "[s]ome circuits have determined that an instructional omission mandates reversal regardless of the circumstances." *Ibid.* (citing *United States* v. *Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *Hoover* v. *Garfield Heights Mun. Ct.*, 802 F.2d 168 (6th Cir. 1986), cert. denied, 480 U.S. 949 (1987)). In contrast, "[o]ther circuits have recognized that this type of mistake will sometimes be amenable to harmless error scrutiny." *Ibid.* (citing *Roy* v. *Gomez*, 81 F.3d 863 (9th Cir.) (en banc), vacated sub. nom. *California* v. *Roy*, 117 S. Ct. 337 (1996); *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995)).

Like other circuits before it, the court of appeals openly acknowledged the need for guidance from this Court to resolve the pervasive and long-standing disagreement among the state and federal courts on this important issue. As the court put it:

> We believe that this discord reflects the gravity of the issue, and we realize, of course, that our opinion in this case can merely provide controlling authority in our own Circuit. For these reasons, we join the Ninth Circuit in noting that further guidance and clarification would be extremely helpful.

App., *infra*, 11a n.11, citing *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991); *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., joined by Marshall, J., dissenting from denial of certiorari). See also *United States* v. *Parmelee*, 42

F.3d 387, 392 & n.7 (7th Cir. 1994) ("the Supreme Court has yet to decide the question whether instructional error of this sort can ever be harmless. * * * a conflict of authority exists concerning the availability of harmless-error analysis in this situation. * * * The depth of this conflict underscores the importance of the question. Both considerations counsel for a grant of certiorari"), cert. denied, 116 S. Ct. 63 (1995); J. Greabe, *Spelling Guilt Out Of A Record? Harmless-Error Review Of Mandatory Presumptions And Elemental Misdescriptions*, 74 B.U. L. REV. 819, 844 (1994) (noting that the current state of the law "has fostered predictable confusion in the lower courts"). This Court should grant the petition to resolve the irreconcilable conflict on this important and recurring question of law.

1. On the evening of March 15, 1991, petitioner George Rogers was driving his pickup truck and was pulled over by a Broward County Deputy Sheriff who suspected him of driving while intoxicated. After taking a field sobriety test, petitioner was arrested for driving while intoxicated. R4:118-19.[1] In the course of a post-arrest search of petitioner and his truck, a .22-caliber handgun and magazine of .380 caliber ammunition were found in petitioner's pocket. The officer also found a .380 caliber handgun and ammunition in the front seat of petitioner's truck. Behind the driver's side of the bench seat of the truck, the officer found a closed black bag containing a MAC-11 pistol, an unserialized silencer and other items. R4:123-24. The bag was not visible from the driver's seat. R4:163.

During a post-arrest interview conducted a few hours later at approximately 3:00 a.m., petitioner admitted possessing the

[1] Petitioner was tried in a state court on the offenses for which he was arrested, including driving while intoxicated and carrying a concealed weapon. He was acquitted by the jury of all charges. R4:163.

.22 and .380 caliber handguns and ammunition. R4:184. He firmly denied, however, ever possessing any of the items in the black bag located behind the driver's seat, including the MAC-11 pistol and the silencer. R4:199-201. Petitioner nonetheless was shown the items from the black bag during the interview and asked by ATF agents: "do you know what these are?" Petitioner stated that he could identify what they were, including the silencer, based upon his training in the Special Forces during his military service in Viet Nam. He "vehemently denied," however, ever possessing those items, including the silencer, or knowing of their existence prior to his post-arrest interview. App., *infra*, 3a. A search of the National Firearms Registration and Transfer Record revealed no firearms registered to petitioner. *Id.* at 2a.

2. Petitioner was charged with possession of an unregistered silencer in violation of 18 U.S.C. § 5861(d), and possession of an unserialized silencer in violation of 18 U.S.C. § 5861(i).[2] The district court instructed the jury that for each offense the government had to prove petitioner "knowingly possessed" the firearm in question. However, the court also instructed the jury that it was *not* required to find petitioner was aware of characteristics of the items that rendered them registerable "firearms" under the statute:

[2] Petitioner also was charged with possession of an unregistered automatic machinegun (the MAC-11 pistol) in violation of 18 U.S.C. § 922(o). However, at trial the government offered no evidence that petitioner was aware the pistol had been converted to an automatic weapon. On appeal, the government conceded that, under *Staples*, petitioner's conviction for possession of the pistol should be vacated because "the government did not submit sufficient proof to the jury that appellant knew the MAC-11 had been converted from semi-automatic to fully-automatic status." U.S. C.A. Br. 5. The court of appeals agreed, holding that under *Staples* the "conviction on this count cannot stand." App., *infra*, 8a.

> It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered. * * * What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that [i]t was not then registered in the National Firearms Registration and Transfer Record.

App., *infra*, 6a. Petitioner timely objected to this instruction, arguing that the prosecution could only establish the offenses charged if it proved beyond a reasonable doubt that "the defendant knew th[e] items in question were firearms" under the statute. *Ibid.* Petitioner's objection was overruled, and the jury later convicted petitioner of each count. The court noted on the record, however, that "this was an extremely sympathetic jury. One man told me after wiping away tears, that the jury all had a lot of compassion for the defendant and it was a difficult decision for them. There were a number of jurors in there, frankly, wiping away tears. I don't often see that. Obviously was a close question for them because I think they felt he, I don't know if it was because of his war record or what happened in the war, or because of his unequivocal answers, but they did feel that compassion." R4:411. The district court sentenced petitioner to time served and three years supervised release, due in part to its finding that petitioner was "concerned about his conviction and his loss of civil rights. That speaks worlds for you, sir." 6/2/94 Tr. at 18.

3. On May 23, 1994, six weeks after the jury verdict, this Court announced its decision in *Staples* v. *United States*, 511 U.S. 600, 609 (1994), holding that the government must prove, as an essential element of the firearms offenses with which petitioner was charged, that the defendant knew "the particular characteristics that make his weapon a statutory

firearm." On the basis of *Staples*, petitioner appealed to the Eleventh Circuit, arguing that the district court reversibly erred in withdrawing from the jury an essential element of the offenses charged. On appeal, the government conceded that the court's instruction on the silencer charge did "not pass post-*Staples* muster insofar as it explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. It argued nonetheless that the instructional omission was "harmless" under *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), because "the evidence that appellant knew the nature of the silencer was unchallenged and unassailable." U.S. C.A. Br. at 10-11, 13.

The Eleventh Circuit affirmed. In doing so, it readily acknowledged that "[w]ith the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)." App., *infra*, 8a. The court also recognized that "the district court committed an error of constitutional dimension when it declined to instruct the jury on an essential element of the crime charged. Our quite daunting task is to determine the effect of that error." *Id.* at 10a.

The Eleventh Circuit addressed the question of harmless error by noting that the failure to instruct the jury on an essential element of the offense charged is not a "structural defect" under *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991):

> "We would be hard pressed to conclude that incomplete jury instructions exemplify a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless error' standards." Instead, we liken the error before us to

> other "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.'"

App., *infra*, 12a (quoting *Fulminante*, 499 U.S. at 279; *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993)).

The Eleventh Circuit distinguished the instructional omission below from the defective reasonable doubt instruction which this Court held in *Sullivan* was not subject to harmless error review, and rejected the Fifth Circuit's holding in *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (1996), that such omissions necessarily require reversal under *Sullivan*. As the court of appeals explained:

> We realize that at least one Court has relied upon *Sullivan* to foreclose the possibility of harmless error review where there has been an instructional omission. See *Pettigrew*, 77 F.3d at 1511. With respect, we feel that *Pettigrew* reads too broadly the basic holding of *Sullivan*. Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, *the typical instructional omission will affect only one element of the crime. Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one*. Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

App., *infra*, 12a n.12 (emphasis added) (citing *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996)).

In reaching its decision, the court of appeals "wholeheartedly accept[ed]" the notion "that it cannot be harmless

when the trial court directs a verdict on an element of the crime charged." App., *infra* 15a. However, it disagreed with the Sixth Circuit's holding in *United States* v. *Mentz*, 840 F.2d 315, 324 n.17 (6th Cir. 1988), that an instructional omission on an essential element is tantamount to a directed verdict in favor of the prosecution: "We do not * * * equate an instructional omission with a directed verdict. In contrast to a directed verdict, the failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue." App., *infra*, 12a n.13, citing *Roy* v. *Gomez*, 81 F.3d 863 (9th Cir.) (en banc), vacated sub nom. *California* v. *Roy*, 117 S. Ct. 337 (1996).

The Eleventh Circuit held Justice Scalia's concurring opinion in *Carella* v. *California*, 491 U.S. 263, 270 (1989) (per curiam), "to be applicable when adjudicating the effect of instructional omissions." App., *infra*, 14a, citing *Roy*, *supra*; *United States* v. *Parmelee*, 42 F.3d 387 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995). Applying that opinion, the Eleventh Circuit ruled that:

> an instructional omission * * * may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) Where the omission related to an element of the crime that the defendant in any case admitted; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element.

App., *infra*, 14a. The court of appeals did *not* find that the first or third exceptions applied. Rather, the Eleventh Circuit concluded that the district court's failure to instruct the jury on

the element of *mens rea* under *Staples* was harmless under the second exception, because it believed petitioner had in effect "admitted" *mens rea* by identifying the silencer during his post-arrest interview:

> In his postarrest interview * * * Rogers emphatically and without reservation admitted that he knew the item found in his truck was a silencer. In fact, Rogers is a self-described student of silencers who had purchased at least one book on the subject. Moreover, Rogers's attorney during closing argument reiterated and attempted to downplay the defendant's concession on this point. These unequivocal assertions convince us that this is a case in which the instructional omission related to an element of the crime that the defendant in any event admitted. * * * We have absolutely no difficulty in concluding that the constitutional error was harmless beyond a reasonable doubt, as we are certain that the verdict in this case would have been the same absent the defective instruction.

App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' HOLDING THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS CONFLICTS WITH DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS.

The court of appeals' decision in this case raises the fundamental question of whether a trial court's failure to instruct the jury on an essential element of a criminal offense can ever be "harmless" under the Constitution where the jury has made no findings concerning the omitted element. On this

recurring issue, federal and state courts are hopelessly deadlocked and have openly called for Supreme Court review.

A. As the Eleventh Circuit acknowledged, the circuits are deeply divided over whether harmless error analysis can be applied to the complete failure by a trial court, over timely objection, to instruct the jury on an essential element of the charged offense. Even the Solicitor General recently conceded the circuit split in cases where "the trial court failed completely to instruct the jury on one or more elements of an offense." Brief for the United States in Opposition, *Masotto* v. *United States*, No. 95-1794, at 13.

The Eleventh Circuit's decision follows similar rulings by the Second and Eighth Circuits holding that complete instructional omissions are subject to harmless error review under *Chapman*. In *Ianniello* v. *United States*, 10 F.3d 59 (2d Cir. 1993), the court applied harmless error review to a failure to instruct the jury on an essential element on the ground that "[h]armless error analysis is the rule rather than the exception, and courts may constitutionally play a guarded role in judging whether facts found by a jury are so conclusive on an ultimate factual issue — *an issue undecided by the jury because of a faulty charge* — that the error in the charge and resultant absence of an actual jury finding on the ultimate issue are harmless." *Id.* at 64 (emphasis added).[3] The court also cited the jury's findings of guilt on other elements as "overwhelming evidence" that the jury would have found the omitted element as well, and deduced that "'no rational juror' could conclude otherwise." *Id.* at 64, 65. In *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996), the court similarly held that

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[3] But see *United States* v. *Rogers*, 9 F.3d 1025, 1033 (2d Cir. 1993) (concluding that removal of essential element from jury's province was a "structural error" mandating reversal), cert. denied, 115 S. Ct. 95 (1994).

instructional omissions "are trial errors subject to harmless error review," as have the courts of last resort of nine states.[4]

Ianniello, *Raether* and the decision below, however, irreconcilably conflict with decisions of the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits, and those of the highest courts of eighteen states.[5]

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[4] See, *e.g.*, *State* v. *Avila*, 710 P.2d 440 (Ariz. 1985); *State* v. *Watson*, 885 P.2d 1226 (Kan. 1994); *State* v. *Nason*, 433 A.2d 424 (Me. 1981); *People* v. *Vaughn*, 524 N.W.2d 217 (Mich. 1994); *State* v. *Lopez*, 920 P.2d 1017 (N.M. 1996); *State* v. *Gunn*, 437 S.E.2d 75 (S.C. 1993), cert. denied, 510 U.S. 1115 (1994); *State* v. *Barr*, 237 N.W.2d 888 (S.D. 1976); *State* v. *Teel*, 793 S.W.2d 236, cert. denied, 498 U.S. 1007 (1990); *State* v. *Wright*, 581 A.2d 720 (Vt. 1989), cert. denied, 498 U.S. 1032 (1991). See also *State* v. *Correa*, 706 P.2d 1321 (Haw. Ct. App. 1985); *People* v. *Navarette*, 629 N.E.2d 742 (Ill. App. Ct. 1994); *State* v. *Jynes*, 652 So. 2d 91 (La. Ct. App. 1995); *Mouton* v. *State*, 892 S.W.2d 234 (Tex. Ct. App. 1995); *Smoot* v. *Commonwealth*, 445 S.E.2d 688 (Va. Ct. App. 1994).

[5] See, *e.g.*, *People* v. *Kobrin*, 903 P.2d 1027 (Cal. 1995); *People* v. *Mattas*, 645 P.2d 254 (Colo. 1982); *Walls* v. *State*, 560 A.2d 1038 (Del.), cert. denied, 493 U.S. 967 (1989); *Carpenter* v. *Commonwealth*, 771 S.W.2d 822 (Ky. 1989); *Commonwealth* v. *Thomas*, 514 N.E.2d 1309 (Mass. 1987); *State* v. *Bluhm*, 460 N.W.2d 22 (Minn. 1990); *Hunter* v. *State*, 1996 WL 352829 (Miss. June 27, 1996); *State* v. *Forsyth*, 642 P.2d 1035 (Mont. 1982); *State* v. *Myers*, 510 N.W.2d 58 (Neb. 1994); *Lomas* v. *State*, 639 P.2d 551 (Nev. 1982); *State* v. *Federico*, 510 A.2d 1147 (N.J. 1986); *People* v. *Flynn*, 589 N.E.2d 383 (N.Y. 1992); *Slusher* v. *State*, 814 P.2d 504 (Okla. Crim. App. 1991); *State* v. *Bryant*, 670 A.2d 776 (R.I. 1996); *State* v. *Gibson*, 908 P.2d 352 (Utah 1995); *State* v. *Aumick*, 894 P.2d 1325 (Wash. 1995); *State* v. *Miller*, 400 S.E.2d 611 (W. Va. 1990); *Vigil* v. *State*, 859 P.2d 659 (Wyo. 1993). See also *Hereford* v. *State*, 615 So. 2d 1303 (Ala. Crim. App. 1993); *Dawson* v. *State*, 894 P.2d 672 (Alaska Ct. App. 1995); *State* v. *Brown*, 647 A.2d 17 (Conn. App. Ct. 1994); *Jones* v. *State*, 666 So. 2d 995 (Fla. Dist. Ct. App. 1996); *Robinson* v. *State*, 473 S.E.2d 519 (Ga. Ct. App. 1996); *McKinney* v. *State*, 553 N.E.2d 860 (Ind. Ct. App. 1990); *Monk* v. *State*, 619 A.2d 166 (Md. Ct. Spec. App. 1993); *State* v. *Rhome*, 462 S.E.2d 656 (N.C. Ct. App. 1995);

For example, in *United States* v. *DiRico*, 78 F.3d 732 (1st Cir. 1996), the First Circuit held that a trial court's failure to submit to the jury an essential element of the crime charged is a "structural defect" requiring reversal. As the court explained, "where a jury has not rendered a verdict that addresses every essential element of the charged offense, and therefore has not rendered a verdict on the crime charged," harmless error analysis has no application because a reviewing court "cannot conclude on appeal that the government proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' since a verdict of guilt as to every essential element was never obtained." *Id.* at 737-38.

DiRico is consistent with decisions of seven other circuits that also have held that instructional omissions are not amenable to harmless error review under *Chapman*. In *United States* v. *Johnson*, 71 F.3d 139, 144 (4th Cir. 1995), for example, the court held that a complete instructional omission precluded harmless error review because there was no independent finding by the jury on the omitted element. To find harmless error, the court held, would have required it to "engage in the type of speculation and hypothesizing censured by the Supreme Court in *Sullivan*." *Ibid.* See also, *e.g.*, *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (under *Sullivan*, omission of an essential element automatically requires reversal because the "the jury rendered no verdict as to that particular element of the offense"); *Hoover* v. *Garfield Heights Mun. Court*, 802 F.2d 168, 178 (6th Cir. 1986) ("the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the *Chapman* harmless error analysis does not apply"); *Waldemer* v. *United States*, 98

State v. *Monroe*, 790 P.2d 1188 (Or. Ct. App. 1990); *Commonwealth* v. *Tharp*, 541 A.2d 14 (Pa. Super. Ct. 1988); *State* v. *Moriarty*, 321 N.W.2d 324 (Wis. Ct. App. 1982).

F.3d 306, 309 (7th Cir. 1996) ("if an element of an offense is not actually found by a jury, appellate court musings as to the actions of a hypothetical rational jury cannot render such an error harmless");[6] *United States* v. *Nguyen*, 73 F.3d 887, 895 (9th Cir. 1995) (where "the jury was precluded from considering whether an essential element existed," and there was no independent jury determination regarding the omitted element, reversal is required); *United States* v. *Laughlin*, 26 F.3d 1523, 1527 (10th Cir.) ("[f]ailure to instruct on such an essential element as intent or knowledge requires reversal because the 'Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'"), cert. denied, 115 S. Ct. 428 (1994); *United States* v. *Wiles*, 1996 WL 707539, at *13 (10th Cir. Dec. 10, 1996) (en banc) ("the district court's failure to instruct the respective juries on [an essential element] is structural and requires us to vacate [the] convictions"); *United States* v. *Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996) (complete failure to present an essential element of the crime charged to the jury presents "a truly compelling claim for reversal").

The conflict over whether instructional omissions are subject to harmless error review is undeniable, and has been widely recognized. See, *e.g.*, *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., dissenting from denial of certiorari) (noting that "a conflict of authority exists concerning the availability of harmless-error analysis" when a jury is not

[6] But see *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994) (stating that "in light of *Sullivan*," the district court's failure to instruct jury on essential element of crime charged "is amenable to harmless-error review," but concluding that the jury's verdict necessarily included a finding beyond a reasonable doubt as to the omitted element), cert. denied, 116 S. Ct. 63 (1995).

instructed on an essential element of the crime charged); *Hoover* v. *Garfield Heights Mun. Ct.*, 802 F.2d 168, 176-77 (6th Cir. 1986) (noting the split in authority and stating that "there is not a clearly preferred answer to the question of whether the failure to instruct on an essential element of the crime charged may be considered harmless"); *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994) (same), cert. denied, 116 S. Ct. 63 (1995); *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991) (noting that "[t]he law in this area is an unfinished symphony," and that "[a]dditional guidance and clarification would be helpful"); App., *infra*, 10a n.11 (same). See also *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), cert. denied, 116 S. Ct. 2529 (1996) (noting similar uncertainty and that its "best guess is that the Supreme Court would regard an omitted element reversible error per se if there were a timely objection").

In large part, this circuit split derives from a fundamental disagreement as to the nature and constitutional significance of an instructional omission on an essential element. Some circuits, like the First, Sixth and Tenth, hold that a complete instructional omission is tantamount to a directed verdict by the trial court on the omitted element, and therefore cannot be harmless. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d at 960; *Hoover* v. *Garfield Heights Mun. Ct.*, 802 F.2d at 177 ("when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless"); *United States* v. *Wiles*, 1996 WL 707539, at *15 (10th Cir. Dec. 10, 1996) (en banc) ("To conclude the error was harmless or not plain would be the same as directing a verdict on the element—both would prevent an actual jury verdict on that element"). Other courts, like the court of appeals below, have expressly rejected this view, refusing to "equate an instructional omission with a directed verdict" on the ground that "failure to instruct on a

particular element does not completely prohibit the jury from considering evidence relevant to that issue." App., *infra* 15a n.13. See also *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 (9th Cir. 1991) (refusing to equate failure to instruct the jury on an essential element with a directed verdict on that element).[7]

B. The prejudice to petitioner and others similarly situated resulting from this split of authority is readily apparent. Had petitioner resided in any of the eight circuits that refuse to apply harmless error analysis to elemental omissions, his criminal conviction would now have been reversed, entitling him to a new trial before a properly instructed jury.

The extent to which harmless error review can be applied to instruction omissions also is a recurring issue that will

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[7] This Court recently granted certiorari in *United States* v. *Johnson*, 82 F.3d 429 (11th Cir. 1996), cert. granted, 117 S. Ct. 451 (Nov. 15, 1996) (No. 96-203). *Johnson*, however, will not resolve the circuit split on the question presented. In *Johnson*, the trial court found the omitted element rather than submit it to the jury, and thus did not involve an instructional omission, but rather an explicit directed verdict by the court on the element in question—an error this Court never has held to be "harmless." Because *Johnson* does not involve a true instructional omission, it cannot resolve the conflict over whether such an omission is tantamount to a directed verdict, or is amenable to harmless error review. Moreover, the petitioner in *Johnson* did not object to the error at trial, and thus the issues there are governed by the plain error standard of Fed. R. Crim. P. 52(b). See Brief for the United States, *United States* v. *Johnson* (No. 96-203), at 11, 13 (arguing "'that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it,'" and that "the more lenient 'harmless error' standards of Rule 52(a) * * * [are] unavailable because, as this Court has observed, that provision governs 'nonforfeited errors'") (quoting *United States* v. *Olano*, 507 U.S. 725, 731 (1993)). In contrast, the question presented here, where a contemporaneous objection was made, is purely a constitutional one that will apply to federal and state courts alike.

continue to confront the state and federal courts in virtually all cases where essential elements have been omitted from the jury's consideration. Given the sheer volume of recent cases decided by the state and federal courts of appeals that have addressed this important issue, without any consensus, there is no reason at all to believe that the lower courts will be able to resolve their disagreement without Supreme Court guidance.

Review by this Court is warranted to resolve this conflict among the federal circuits and state courts of last resort and to bring needed clarity to this important area of the law.

II. THE COURT OF APPEALS WRONGLY HELD THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS EVEN WHERE THE JURY HAS FAILED TO FIND FACTS ESTABLISHING THE MISSING ELEMENT BEYOND A REASONABLE DOUBT.

It is undisputed that the district court in this case failed to instruct the jury on an essential element of the offenses with which petitioner was charged, *i.e.*, his knowledge that the items he allegedly possessed were "firearms" within the meaning of the National Firearms Act. It is also uncontested that the jury never made findings concerning this omitted element.[8] The

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[8] This case does not involve one of those "rare situations" where what the jury found can fairly be said to encompass what it was told not to find. *Carella*, 491 U.S. at 270 (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion)). The trial court expressly instructed the jury that the government was *not* required to prove petitioner's knowledge that he possessed an item bearing the characteristics of a "firearm" under the Act (*i.e.* his knowledge that what he possessed was an operational silencer). As the government conceded below, the court "explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. The Eleventh Circuit also explicitly found that none of the jury's findings, alone or in combination, logically required it to find that petitioner knew he

court of appeals nevertheless affirmed petitioner's convictions, holding that the district court's constitutional error was harmless because the jury "made a constitutionally valid determination of guilt on all issues save one." App., *infra*, 13a n.12. The court also noted its "certain[ty] that the verdict in this case would have been the same absent the defective instruction." *Id.* at 17a.

The court of appeals' use of "harmless error" review in this case to supply a finding that the jury never made cannot be reconciled with this Court's decisions that consistently have safeguarded the defendant's right to a jury determination on *all*

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possessed an operational silencer. App., *infra*, 14a-15a (declining to find that this case was one "[w]here the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element").

Accordingly, this case is unlike those in which the Court has denied certiorari where the essential element in dispute, while not separately listed by the trial court, was actually found by the jury. In *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995) (Nos. 94-1933 and 94-9078), for instance, the Solicitor General opposed certiorari on the ground that "while the court's listing of the elements did not expressly refer to" the element in question, the jury instructions, taken as a whole, "required a finding" by the jury of the element. Brief for the United States in Opposition, at 8. Similarly, in *United States* v. *Edmonds*, 80 F.3d 810 (3d Cir.), cert. denied, 117 S. Ct. 295 (1996) (No. 96-25), where petitioner complained that harmless error analysis was erroneously applied to the trial court's failure to instruct the jury on an essential element, (see Brief for the Petitioner, at 6-9), the Solicitor General countered that the instructions required "the jury [to make] the functional equivalent of . . . a finding" on the omitted element. Brief for the United States in Opposition, at 8. See also Brief for the United States in Opposition, *Masotto* v. *United States*, No. 95-1794, at 12 (opposing certiorari on the ground that the court of appeals "could conclusively determine from the record of the case that the jury, despite the instructional error, actually found that petitioner was a leader of the RICO enterprise"). In short, the principal factor counseling against certiorari in these cases is not present here.

essential elements of the offense charged. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Under *Sullivan*, failure to instruct the jury on an essential element of an offense, and the jury's resultant failure to determine whether that element was established beyond a reasonable doubt, cannot constitutionally be "harmless" regardless of an appellate court's "certainty" of guilt.

A criminal defendant's constitutional right to a trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277. Accord *United Bhd. of Carpenters* v. *United States Bay Counties Dist. Council*, 330 U.S. 395, 409-10 (1947) ("guilt is determined by the jury, not the court"). As Justice Frankfurter explained 50 years ago in *Bollenbach* v. *United States*, 326 U.S. 607 (1946):

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Id. at 615. See also Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1191 (1995).

The constitutional right to a jury determination of guilt "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995). Accord *In re Winship*, 397 U.S. 358, 364 (1970) ("we explicitly hold that the Due Process Clause protects the accused against conviction except upon

proof beyond a reasonable doubt of every fact necessary to constitute the crime with he is charged"). This is a right that cannot be made to depend upon a court's perception of the defendant's guilt.[9] A court "may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. Accord, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (the jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction") (citing *Carpenters*, 330 U.S. at 408; *Sparf* v. *United States*, 156 U.S. 51, 105 (1895)).

The Eleventh Circuit's decision in this case cannot be reconciled with these precedents. The court of appeals readily acknowledged that "the district court committed an error of constitutional dimension when it declined to instruct the jury on an essential element of the crime." App., *infra*, 10a. The court nevertheless upheld petitioner's silencer possession conviction of an unregistered silencer by holding that the district court's instructional omission was "harmless." Citing

[9] Of course, if the instructional omission does not prevent the reviewing court from concluding, beyond a reasonable doubt, "that the jury actually made the finding that inheres in the [omitted] element," then harmless error review may be applied. See *Roy*, 117 S. Ct. at 339-40 (Scalia, J., joined by Ginsburg, J., concurring) (citing *Carella*, 491 U.S. at 271 (Scalia, J., joined by Brennan, Marshall & Blackmun, JJ., concurring in the judgment)). But, as noted *supra* at 18 n.9, the instructions in this case did not require the jury to make any finding on the omitted element, and instead *removed* that element from the jury's consideration. Thus, as this Court held in *Sullivan*, 508 U.S. at 280, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate."

petitioner's statements during a post-arrest police interrogation as to his general familiarity with silencers due to his military service, the court of appeals concluded that petitioner "emphatically and without reservation admitted that he knew the item found in his truck was a silencer." App., *infra*, 16a. It thus found the trial court's instructional omission of that element harmless because it was "certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 17a.[10]

Regardless of whether it properly "weighed" the evidence, the court of appeals reversibly erred by engaging in harmless error review. Harmless error analysis has no application in cases like this where the jury never made a constitutionally valid determination of guilt on each essential element of the offense charged. Where "there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent." *Sullivan*, 508 U.S. at 280.

The court of appeals, however, held that *Sullivan* was inapplicable to this case since the district court's instructional omission involved "only one element" of the offenses charged:

[10] Even if petitioner had "admitted" the element omitted in this case (which he did not), the government still would not be relieved of its burden to establish that element beyond a reasonable doubt, nor would it have diminished petitioner's right to a jury determination of guilt on that element. As Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas, recently explained in her dissent in *Old Chief v. United States*, 1997 WL 3230 (Jan. 7, 1997), "a defendant may * * * choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element. It follows from these principles that a defendant's stipulation to an element of an offense does not remove that element from the jury's consideration." *Id.* at *15-*16.

> the jury [made] a constitutionally valid determination of guilt on all issues save one. . . . Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

App., *infra*, 12a n.12.

The notion that a criminal conviction can be upheld as long as the jury "only" fails to find "one element" of the offense represents an untenable erosion of the guarantees of Article III and the Fifth and Sixth Amendments. This Court in *Gaudin* explicitly reaffirmed "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence *on every issue*." 115 S. Ct. at 2315 (emphasis added). As Justice Scalia recently explained in his concurring opinion in *California* v. *Roy*, 117 S. Ct. 337 (1996), a case where the trial court erroneously failed to instruct the jury on "only" one element of the offense:

> a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, no matter how inescapable the findings to support that verdict might be. A jury verdict that he is guilty of the crime means, of course, a verdict that he is guilty of *each necessary element of the crime*. * * * The absence of a formal verdict on [one element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury.

Id. at 339 (emphasis added) (citations and quotations omitted). See also *Old Chief v. United States*, 1997 WL 3230, at *15 (U.S. Jan. 7, 1997) (O'Connor, J., joined by Rehnquist, Scalia

and Thomas, JJ., dissenting) ("The Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of *every element* of the crime of which he is charged beyond a reasonable doubt") (emphasis added).

Justice Scalia's discussion in *Roy* confirms the court of appeals' reversible error in this case. By assessing the evidence on an element that the jury never considered, and by then *supplying* the jury's missing finding based upon its "certainty" that the verdict would have been the same anyway, the court of appeals violated petitioner's constitutional right to a jury determination of guilt. Indeed, by deciding that the omitted element was established by the evidence, the court of appeals directed a verdict in favor of the government on that element.

The court of appeals justified its weighing of the evidence by citing Justice Scalia's statement in *Carella* that an instruction that erroneously establishes a conclusive presumption can be harmless if it relates to an "element of the crime that the defendant in any case admitted." 491 U.S. at 270 (Scalia, J., joined by Brennan, Marshall & Blackmun, JJ., concurring) (citing *Johnson*, 460 U.S. at 87). The court of appeals' reliance on Justice Scalia's concurrence in *Carella*, however, is misplaced, twisting an opinion that resoundingly rejects the notion of appellate convictions into one that would embrace it. *Carella* involved an incorrect instruction concerning a *presumption*—not a missing element. The jury, notwithstanding the error, was correctly instructed on the required elements of the charged offense. That is, the instructional error did not involve the wholesale omission of an element, but a misinstruction as to how the element could be proven. In a case like *Carella*, an unequivocal in-court admission may indeed render a defective presumption harmless since it is reasonable to believe that such compelling evidence going directly to the "ultimate fact" might render the presumption superfluous. In that instance, a reviewing court can conclude that the jury in

fact made the requisite findings concerning the element in question. An admission in such circumstances renders an instructional error as to a presumption harmless *not* because the admission can substitute for a missing jury finding, but because it "sufficiently reduc[es] the likelihood that the jury applied the erroneous instruction" at all. *Johnson*, 460 U.S. at 87.

Whether a properly instructed jury would have found the element omitted by the district court below is a question that the court of appeals simply was not permitted to ask—let alone answer. Such an inquiry is permissible only "if the jury verdict on other points effectively embrace[d the missing point] or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well." *Roy*, 117 S. Ct. at 339-40 (Scalia, J., joined by Ginsburg, J., concurring) (citing *Carella*, 491 U.S. at 270-71 (Scalia, J., joined by Brennan, Marshall & Blackmun, JJ., concurring)).

That the court of appeals below may have viewed the evidence on the missing element overwhelming (a point petitioner strongly contests) is irrelevant:

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. * * * A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

Sullivan, 508 U.S. at 280-81 (quoting *Rose* v. *Clark*, 478 U.S. 570, 578 (1986)). "The absence of a formal verdict on [an omitted element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would

be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring).

Notwithstanding these basic tenets of constitutional law, the court of appeals below, like others before it, continue to issue appellate pronouncements of guilt on elements never considered by the jury. As recently explained by Chief Judge Edwards, "the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong." 70 N.Y.U. L. REV. at 1170.

Petitioner's conviction was not the product of "an actual jury finding of guilty." *Sullivan*, 508 U.S. at 280. Such an error cannot constitutionally be "harmless."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 94-4692
GEORGE G. ROGERS,	)	
Defendant-Appellant.	)	

Sept. 17, 1996.

Richard C. Klugh, Asst. Federal Public Defender, Ft. Lauderdale, FL, for Appellant.

Madeleine R. Shirley, Lisa T. Rubio, Linda Collins Hertz, U.S. Attorneys, Miami, FL, for Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Circuit Judge, and FAY and GIBSON*, Senior Circuit Judges.

FLOYD R. GIBSON, Senior Circuit Judge:

* HONORABLE FLOYD R. GIBSON, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

A jury found appellant George Rogers guilty of committing various firearms violations named in a three count indictment. He now appeals the convictions, claiming that reversible error occurred when the district court failed to instruct the jury on an essential element of each of the offenses. Though the evidence presented at trial is insufficient to sustain the jury's verdict on one of the three counts, we deem the instructional omission tobe harmless beyond a reasonable doubt and thus affirm on the remaining two charges.

I. BACKGROUND

After arresting appellant George Rogers for driving while intoxicated, Broward County, Florida Deputy Sheriff Mahmoud Mashnouk searched both Rogers and the truck he had been driving. Deputy Mashnouk discovered that Rogers was carrying on his person a .22 caliber handgun and one magazine of .380 caliber ammunition. Inside Rogers's vehicle, Mashnouk found a loaded .380 caliber Baretta pistol equipped with a flash suppressor. In addition, the officer located beneath the driver's side seat of the truck a black bag containing a MAC-11 pistol, a silencer, a flash suppressor, .380 caliber ammunition, several ammunition magazines for the MAC-11, two holsters, and miscellaneous other items. Later investigation revealed that the MAC-11 had been fully modified to function as a "machinegun"[1] under federal law. Further, the silencer

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[1] "The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger...." 26 U.S.C. § 5845(b) (1994); see 18 U.S.C. § 921(a)(23) (1994) (providing that the term "machinegun," as used in 18 U.S.C. §§ 921-930, should be defined by reference to 26 U.S.C. § 5845(b)).

did not possess a serial number and had not been registered in the National Firearms Registration and Transfer Record.

Following his arrest, Rogers agreed to be interviewed by, among others, Special Agent Dale Armstrong from the Bureau of Alcohol, Tobacco, and Firearms. During this conversation, Rogers professed his expertise in weapons and correctly identified the silencer and the MAC-11. Nonetheless, Rogers vehemently denied ownership of those two firearms and claimed that he had no idea who might have placed them in his vehicle.

Thereafter, the United States returned an indictment charging Rogers with: 1) knowing possession of a machinegun in violation of 18 U.S.C. § 922(o) (1994) (count one); 2) knowing possession of a silencer not registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. §§ 5861(d), 5871 (1994) (count two); and 3) knowing possession of a silencer without a serial number in violation of 26 U.S.C. §§ 5861(i), 5871 (1994) (count three). At trial, the Government played for the jury an edited audiotape of Rogers's postarrest interview.[2] Testifying on his own

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[2] As the following excerpts show, this recording revealed in no uncertain terms the depth of Rogers's familiarity with weapons, their construction, and their component parts:

[Rogers]: I don't know anything about [the ownership of the MAC-11 or the silencer].
[Agent]: Okay.
[Rogers]: And I definitely know what they are.
[Agent]: You do.
[Rogers]: Yes sir.
[Agent]: Okay, what are they?
[Rogers]: One is a uh, that is a .380, I think a MAC.
[Agent]: Okay.

(continued...)

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[2](...continued)

[Rogers]: And the other is a, that is a silencer.

* * * * * *

[Rogers]: You want to ask me how to make a silencer. I'll tell ya. You get, you get a [expletive] oil filter, that's the best silencer you can get. Don't they teach you that in, in a, in Special Forces? That's what they taught me.

* * * * * *

[Agent]: Do you know, do you know what these are?
[Rogers]: Yes sir.
[Agent]: What are those?
[Rogers]: Those are baffles for a silencer.

* * * * * *

[Agent]: How did you, how did you learn so much about, about silencers?
[Rogers]: I studied.
[Agent]: Studied?
[Rogers]: Yes, sir.
[Agent]: Okay.
[Rogers]: In fact if you probably go to my house now there's a book on silencers.

* * * * * *

[Rogers]: There's a book I think, unless I packed it away, I don't know.
[Agent]: Okay.
[Rogers]: Some screwball book I bought at a gun show.
[Agent]: Okay, anything ...
[Rogers]: But it's nothing we weren't taught.
[Agent]: Okay.

(continued...)

behalf, Rogers contended that the black bag seized by Deputy Mashnouk was not his, and he continued to maintain that he had no knowledge of how the illegal weapons came to be in his truck. Also, Rogers again positively identified the firearms that are the subject of this case.[3]

While instructing the jury on the pertinent offenses, the district court generally advised the panel that for each violation

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[2](...continued)

[Rogers]: You know, you want a silencer, you, you, you get a, what's the best silencer?
[Agent]: Sionics.
[Rogers]: No, it's, it's a two liter bottle. I mean everybody knows that, I mean this ...
[Agent]: A two liter Coke bottle you're telling me ...
[Rogers]: Yeah....

[3] The following exchange took place between Rogers and his attorney:

Q: Mr. Rogers, Government's Exhibit No. 5, do you know what this is?

A: This is a silencer, yes. I know exactly.

Q: You are familiar with it?

A: Yes.

* * * * * *

Q: Mr. Rogers, showing you Government's Exhibit No. 2, do you know what this is?

A: Yes. It's a .380 Ingram [MAC-11] and it was manufactured first for the police departments and then when war broke out they introduced it into the military....

the Government had to prove Rogers "knowingly possessed" the firearm in question. In explaining the law applicable to count 2, however, the court elaborated:

It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.... What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that i[t] was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

Rogers objected to this instruction on the basis that the prosecution could not prevail unless it demonstrated beyond a reasonable doubt that "the defendant knew th[e] items in question were firearms" under the National Firearms Act, 26 U.S.C. §§ 5801-5872 (1994) (the "Act"). The district court overruled Rogers's objection.

The jury subsequently convicted Rogers on all counts; the district judge sentenced him to time served (thirty-three months), three concurrent three year terms of supervised release, and a special assessment of $150. Relying on the United States Supreme Court's recent opinion in *Staples* v. *United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), Rogers presently asserts the district court committed error when it refused to inform the jury that the Government was obligated to establish he knew the characteristics of the weapons at issue that subjected them to the Act's regulatory scheme.

II. DISCUSSION

The Act contains various directives, including registration requirements, that apply to a class of statutorily defined "firearms." See 26 U.S.C. §§ 5845(a), 5861 (1994). In

Staples, the Supreme Court addressed the mens rea element under § 5861(d) of the Act.[4] After expressing its reluctance to interpret laws in a manner that would "criminalize a broad range of apparently innocent conduct," *Staples*, 511 U.S. at ___, 114 S.Ct. at 1799 (quotation omitted), the Court concluded that the Government can procure a conviction under the subsection only when it proves the defendant "knew of the features of his [weapon] that brought it within the scope of the Act," *id.* at ___, 114 S.Ct. at 1804. We must now consider the effect of this holding, which overrules the previous law of this Circuit, *cf. United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1984), on Rogers's convictions.

A. Rogers's Conviction Under 18 U.S.C. § 922(o)

With limited exceptions, 18 U.S.C. § 922(o) makes it unlawful for an individual to possess a machinegun. In a consonant voice, the parties contend that Rogers's conviction under this subsection should be reversed due to insufficient evidence. We agree.[5] The MAC-11 machinegun located in Rogers's truck had originally been manufactured as a semi-automatic pistol. Because the Government did not introduce any evidence showing that Rogers was aware that the MAC-11

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[4] Section 5861(d) makes it unlawful for a person to "receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d) (1994).

[5] We also agree with the Government that the Supreme Court's decision in *Staples* applies with equal force to prosecutions under 18 U.S.C. § 922(o).

had been altered to operate as a fully automatic weapon,[6] his conviction on this count cannot stand. See *Staples*, 511 U.S. at ___, 114 S.Ct. at 1804.

B. Rogers's Convictions Under 26 U.S.C. §§ 5861(d), (i), 5871

The jury also found that Rogers possessed an unregistered and unserialized silencer in violation of 26 U.S.C. §§ 5861(d), (i), 5871. These convictions pose a considerably more difficult problem on this appeal. As discussed above, the district court, over a defense objection, refused to inform the jury that the Government had the burden of showing Rogers "knew th[e] items in question were firearms" under the Act.[7] With the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d).[8]

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[6] Notably, the conversion process, which sometimes ensue from normal wear and tear, see *Staples*, 511 U.S. at ___, 114 S.Ct. at 1802, resulted in few, if any, noticeable changes in the outward appearance of the handgun.

[7] We underscore that the district court's instructions were entirely in accord with the law of this Circuit at the time of trial.

[8] The Court in *Staples* limited its analysis to § 5861(d), which prohibits the possession of an unregistered firearm. Section 5861(i), in turn, proscribes the possession of a firearm unidentified by a serial number. Because we adjudge the instructional error involved here to be harmless, for the purposes of this case only we will assume without deciding that the Court's pronouncements in *Staples* apply as well to criminal proceedings under § 5861(i).

In 1947, the Supreme Court stressed that in a criminal case "guilt is determined by the jury, not the court." *United Bhd. of Carpenters* v. *United States*, 330 U.S. 395, 410, 67 S.Ct. 775, 783, 91 L.Ed. 973 (1947). This right, grounded in the Sixth Amendment,[9] to have the jury decide guilt or innocence reposes within that body the "overriding responsibility ... to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977). "Thus, although ajudge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan* v. *Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

While the Sixth Amendment ensures that the defendant's peers in the community will serve as the ultimate arbiters of his fate, the Fifth Amendment's Due Process Clause[10] creates the legal framework which guides the jury in its task. See *id.* at 277-78, 113 S.Ct. at 2080-81. Significantly, the Government bears the burden of proving beyond a reasonable doubt all elements of the crime charged. *Id.* Indeed, the Supreme Court has "explicitly h[e]ld that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Put simply,

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[9] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." U.S. Const. amend. VI.

[10] "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. Const. amend. V.

then, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278, 113 S.Ct. at 2081.

Given this background, it is readily apparent that in this case the district court committed an error of constitutional dimension when it declined to instruct the jury on an essential element of the crime. Our quite daunting task is to determine the effect of that error. Rogers asserts that the failure to instruct on an essential element of an offense is *per se* reversible. On the other hand, the Government predictably declares that affirmance is in order because the error was harmless. Neither we nor the Supreme Court has ever definitively ascertained the consequences that should follow from an instructional omission, and our sister circuits are divided on the issue.[11]

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[11] Some circuits have determined that an instructional omission mandates reversal regardless of the circumstances. See *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (explaining that harmless error analysis is inapplicable where an essential element "was withheld from the jury"); *Hoover* v. *Garfield Heights Mun. Court*, 802 F.2d 168, 178 (6th Cir. 1986) ("[W]e conclude that the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the Chapman harmless error analysis does not apply."), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1610, 94 L.Ed.2d 796 (1987). Other circuits have recognized that this type of mistake will sometimes be amenable to harmless error scrutiny. *Roy* v. *Gomez*, 81 F.3d 863, 866-67 (9th Cir. 1996) (*en banc*) (finding that harmless error analysis applies to a failure to instruct on an element of the offense); *United States* v. *Parmelee*, 42 F.3d 387, 392-93 (7th Cir. 1994) (same,) *cert. denied*, – U.S. –, 116 S.Ct. 63, 133 L.Ed.2d25 (1995).

(continued...)

To settle this dispute, we begin by recalling the benchmark decision in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). There, the Court rejected the notion that a constitutional error in all cases compels reversal. *Id.* at 22, 87 S.Ct. at 827. Rather, the encroachment at trial of a constitutional right may be considered harmless if the beneficiary of the error "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. By so holding, the Court "continued a trend away from the practice of appellate courts in this country and in England of reversing judgments for the most trivial errors." *Connecticut* v. *Johnson*, 460 U.S. 73, 82, 103 S.Ct. 969, 975, 74 L.Ed.2d 823 (1983) (plurality opinion) (quotation and alteration omitted).

The *Chapman* Court did acknowledge, though, that there exist "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-28. Throughout the years, it has become evident that this limitation is confined to constitutional errors that cause a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

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[11](...continued)

We believe that this discord reflects the gravity of the issue, and we realize, of course, that our opinion in this case can merely provide controlling authority within our own Circuit. For these reasons, we join the Ninth Circuit in noting that further guidance and clarification would be extremely helpful. See *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n. 2 (9th Cir. 1991); *cf. Teel* v. *Tennessee*, 498 U.S. 1007, 1007, 111 S.Ct. 571, 571, 112 L.Ed.2d 577 (1990) (White, J., dissenting from the denial of certiorari).

thus, we must reverse without regard to the underlying facts of a particular case where, for example, the defendant is totally deprived of the right to counsel, tried before a biased judge, refused his right to self-representation, or denied his right to a public trial. See *id.* at 309-10, 111 S.Ct. at 1264-65 (collecting cases). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose* v. *Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986) (citation omitted).

We would be hard pressed to conclude that incomplete jury instructions exemplify a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309, 111 S.Ct. at 1265. Instead, we liken the error before us to other "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be qualitatively assessed in the context of other evidence presented.'" *Sullivan*, 508 U.S. at 281, 113 S.Ct. at 2082-83 (quoting *Fulminante*, 499 U.S. at 307-08, 111 S.Ct. at 1264). Of particular relevance here are those cases dealing with the application of harmless error analysis to constitutionally defective jury instructions.[12] In

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[12] The Supreme Court has stated that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579, 106 S.Ct. at 3106. We find it telling that in only one case has the Supreme Court deemed an instructional error to be *per se* reversible. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The trial court in *Sullivan* had given a constitutionally defective reasonable doubt instruction that effectively "vitiate[d] all the jury's findings." *Id.* at 281, 113 (continued...)

Rose, the Court ruled that an error under *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), which erects an unconstitutional mandatory presumption shifting to the defendant the burden of proof on an element of the offense, could in some cases appropriately be the subject of harmless error review. *Rose*, 478 U.S. at 579-82, 106 S.Ct. at 3106-08. The Court restated this conclusion in *Carella* v. *California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (per curiam). More importantly, however, *Carella* included a cogent concurrence penned by Justice Scalia more precisely elaborating upon the type of harmless error inquiry suitable when reviewing a *Sandstrom* claim. See

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[12](...continued)
S.Ct. at 2082. Thus, in that case there was no finding of guilt beyond a reasonable doubt upon which harmless error scrutiny could operate. *Id.* at 280-81, 113 S.Ct. at 2082-83.

We realize that at least one Court has relied upon *Sullivan* to foreclose the possibility of harmless error review where there has been an instructional omission. See *Pettigrew*, 77 F.3d at 1511. With respect, we feel that *Pettigrew* reads too broadly the basic holding of *Sullivan*. Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, the typical instructional omission will affect only one element of the crime. Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one. Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate. See *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996) (observing that *Sullivan* does not prevent harmless error review where "the district court's failure to let the jury decide the [omitted] issue did not prevent the jury from properly deciding the other issues in the case").

Carella, 491 U.S. at 267-73, 109 S.Ct. at 2421-24 (Scalia, J., concurring).

Other circuits have indicated that Justice Scalia's concurrence in *Carella* outlines the harmless error framework to be used in appeals involving instructions that omit an essential element of the offense. *Roy*, 81 F.3d at 866-67; *Parmelee*, 42 F.3d at 392-93. We understand full well that there are some important differences between the incomplete instructions in this case and the *Sandstrom* violation at issue in *Carella*. Nonetheless, we, too, find Justice Scalia's concurrence persuasive in the instant context and therefore deem the reasoning of that opinion to be applicable when adjudicating the effect of instructional omissions. *Cf. Carella*, 491 U.S. at 270, 109 S.Ct. at 2423 (Scalia, J., concurring) (suggesting that all errors in instructions that "deprive[] the jury of its factfinding role" should be evaluated similarly).

According to Justice Scalia, where the trial court's directions prevented the jury from determining guilt beyond a reasonable doubt on every element of the offense, due regard for the defendant's Fifth and Sixth Amendment rights necessitates that harmless error analysis be available only in those "rare situations when the reviewing court can be confident that such an error did not play any role in the jury's verdict." *Id.* at 270, 109 S.Ct. at 2423 (quotations and alteration omitted). Consequently, an instructional omission, similar to a *Sandstrom* error, may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) Where the omission related to an element of the crime that the defendant in any case admitted; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also

finding the element.[13] See *id.* at 270-71, 109 S.Ct. at 2423-24.

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[13] In deciding that a constitutional error of the sort involved here can in some situations be harmless, we take comfort in our own prior opinions. Though before today we have not directly addressed whether an instructional omission can constitute harmless error, our Court has never treated this type of flaw as reversible *per se*. See *United States* v. *Miller*, 22 F.3d 1075, 1079-80 (11th Cir. 1994) (holding that omission was not plain error); *Knight* v. *Dugger*, 863 F.2d 705, 707, 730-31 (11th Cir. 1988) (adopting and appending district court's opinion finding omission harmless); *United States* v. *Duncan*, 855 F.2d 1528, 1531-32 (11th Cir. 1988) (failing to find plain error), *cert. denied*, 489 U.S. 1029, 109 S.Ct. 1161, 103 L.Ed.2d 220 (1989); *Adams* v. *Wainwright*, 764 F.2d 1356, 1363-64 (11th Cir. 1985) (concluding that omission was not reversible), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986). In *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984), this Court held that it cannot be harmless when the trial court directs a verdict on an element of the crime charged. We wholeheartedly accept this observation as an accurate recitation of the law. See *Rose*, 478 U.S. at 578, 106 S.Ct. at 3106 ("[H]armless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury.") We do not, however, equate an instructional omission with a directed verdict. In contrast to a directed verdict, the failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue. See *Roy*, 81 F.3d at 866-67 (distinguishing between an omission and a directed verdict on an element). Accordingly, we do not believe the Court's opinion in Goetz precludes us from finding the error here to be harmless. But see *United States* v. *Mentz*, 840 F.2d 315, 324 n. 17 (6th Cir. 1988) (refusing to distinguish between an omission and a directed verdict on an element).

Employing this standard in the appeal currently before us, we are confident that the facts of this case fall squarely within the second category listed above. In his postarrest interview, which was reproduced for the jury via audiotape, and again on the witness stand at trial, Rogers emphatically and without reservation admitted that he knew the item found in his truck was a silencer. In fact, Rogers is a self-described student of silencers who had purchased at least one book on the subject. Moreover, Roger's attorney during closing argument reiterated and attempted to downplay the defendant's concession on this point.[14] These unequivocal assertions convince us that this is a case in which the instructional omission related to an element of the crime that the defendant in any case admitted.

Given Rogers's open and forthright admission, we may find the instructional error harmless if we decide that the Government has "prove[d] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. "The inquiry, in

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[14] Rogers's attorney argued to the jury:
They make, [the] Government makes a big deal about the fact that Mr. Rogers readily is able to identify and explain what all these items are. They want you to take a quantum leap then because of that assume that there is [sic]. Well that's not the case. Mr. Rogers testified that he has been around firearms since the '60's--or since he was a child; that he has used silencers unfortunately in Vietnam where he was wounded. So, sure, he knows what silencers are. Big deal. He knows what automatic weapons are. He reads books. He's a gun enthusiast. He goes to gun shows. That's not illegal. So what? Yes, he knows what they are and he honestly said "Yes, I know what they are," and expends [sic] what they are. That doesn't mean he knew about it, he had knowledge of it being in the back of his pickup truck. Don't jump to that conclusion like the Government wants you to do.

other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279, 113 S.Ct. at 2081. We have absolutely no difficulty in concluding that the constitutional error was harmless beyond a reasonable doubt, as we are certain that the verdict in this case would have been the same absent the defective instruction. In light of the relevant evidence evaluated by the jury, including Rogers's repeated admissions, we hold that the omission was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates* v. *Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991). It follows that Rogers's convictions for violating 26 U.S.C. §§ 5861(d), (i), 5871 must be affirmed.[15]

III. CONCLUSION

Due to the Supreme Court's recent opinion in *Staples*, we are constrained to reverse for insufficiency of the evidence Rogers's conviction for violating 18 U.S.C. § 922(o). Still, because we have determined that the constitutional error committed by the district court when instructing the jury was harmless beyond a reasonable doubt, we affirm Rogers's convictions for violating 26 U.S.C. §§ 586(d), (i), 5871.

AFFIRMED in part and REVERSED in part.

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[15] This case represents another "concrete example of why it would be a quixotic exercise of form over substance to deny under all circumstances the application of harmless error analysis to an instructional omission on an uncontested issue." *Hennessy*, 929 F.2d at 515.

[File-Stamped Jan. 6, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4692

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE G. ROGERS,

Defendant-Appellant.

On Appeal From the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: EDMONTON, Circuit Judge, and FAY and GIBSON*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

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* Hon. Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

United States District Court

Southern District of Florida

UNITED STATES OF AMERICA
v.
GEORGE G. ROGERS
Marshal #29123-004

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed on or After November 1, 1987)

Case Number:
91-6044-CR-ROETTGER
A.U.S.A.-Bardfeld
Edward Salantrie, Esq.
633 S.E. 3rd Ave. #4F
Ft. Lauderdale, FL 33301

THE DEFENDANT:

☐ pleaded guilty to count(s)_____
■ was found guilty on count(s) 1, 2 & 3 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18;922(o)	Possession of a machine gun	3/15/91	1
26;5861(d)	Possession of unregistered silencer		2
28;5861(i)	Possession of silencer w/out serial number.		3

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ____, and is discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

■ It is ordered that the defendant shall pay a special assessment of $150.00, for count(s) 1, 2 & 3, which shall be due ■ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 406-50-4016

Defendant's Date of Birth: 8/9/39

June 2, 1994
Date of Imposition of Sentence

Defendant's Mailing Address:

5460 N.W. 36th Terrace
Ft. Lauderdale, FL 33309

Defendant's Residence Address:

_____
_____

/s/
Signature of Judicial Officer

NORMAN C. ROETTGER
CHIEF UNITED STATES DISTRICT COURT JUDGE
Name & Title of Judicial Officer

7 June 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TIME SERVED as to each Count 1, 2 & 3, to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for the district,

a.m.
☐ at _____ p.m. on _____
☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
☐ before 2 p.m. on _____.
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE years as to each Count 1, 2 & 3 to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

■ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

■ The defendant shall not possess a firearm or destructive device.

Further defendant shall submit to a reasonable search & seizure of person, auto, boat and residence when requested by the probation officer. The defendant shall participate in a mental health treatment program approved by the probation office, if deemed necessary by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in resident or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.